Petition

81-170

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALBERTO CORA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the post arrest conduct of Special Agents of the Drug Enforcement Administration in instructing the petitioner's wife and a third person not to contact an attorney constitutes a violation of the petitioner's Sixth Amendment right to counsel?

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SUPREME COURT OF THE UNITED STATES
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ALBERTO CORA,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Alberto Cora, hereby petitions for a writ of certiorari to review the judgment of the Unitd States Court of Appeals for the Second Circuit which affirmed a judgment of conviction entered against him in the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit rendered on April 8, 1981, is as yet unreported, but is set forth herein in the Appendix as "Exhibit A."

JURISDICTION

The judgment of the Court of Appeals was dated and entered on April 8, 1981.

On May 27, 1981 the said Court denied a petition for rehearing that had been filed by the co-defendant-appellant, Ralph Grella. A copy of said order is also set forth in the Appendix as "Exhibit B."

Jurisdiction is conferred upon this Court by 28 U.S.C. 1254(1).

CONSTITUTIONAL AMENDMENT TO BE CONSTRUED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT

The petitioner was charged in a five-count indictment, and named in two, with the crimes of conspiring to and substantively violating the federal narcotic laws, i.e. 21 U.S.C. 846.

The petitioner, together with co-defendants Robert Miller and Ralph Grella, proceeded to trial before the Hon. Lee P. Gagliardi and a jury in the United States District Court for the Southern District of New York, and was found guilty as charged.

The petitioner was thereupon sentenced to a term of imprisonment for one (1) year and one (1) day which he is now serving.

STATEMENT OF FACTS SURROUNDING THE ARREST OF THE PETITIONER, ALBERTO CORA

The proof as to the arrest and post-arrest statements of Alberto Cora were set forth in a hearing held in connection with a timely motion to suppress made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

Julio Mercado, an agent of the Drug Enforcement Administration, testified that at about 11:50 A.M. on July 24, 1980, he in the company of fellow agents Scalzo and Rodriguez drove to 253 Wilson Avenue, Brooklyn, New York (H. 4).* The petitioner was seated in front thereof, approached Agent Mercado then in a government vehicle, and was placed under arrest (H. 6). The petitioner's wife came over and asked "What happened, what are you doing to him?" (H. 6-7). Whereupon Agents Scalzo and Rodriguez identified themselves and told her that the petitioner had been arrested for violation of the federal narcotics laws. The petitioner then proclaimed his innocence.

Agent Mercado then told Mrs. Cora, "This is my number, he is going to be before the magistrate later this evening. Give me a call in an hour and I will let you know exactly where he is going to be at" (H. 7).

Additionally Agent Mercado told Mrs. Cora that her husband would be before the Magistrate later that evening, would probably make bail and be released (H. 7).

At that time neither the petitioner stated that "I'll do anything to get out of here, whatever you want me to do, anything." (H. 8).

Whereupon Agent Mercado told Mrs. Cora "do us a favor, don't call anybody, don't call Blackie[1] and let him know that Mr. Cora has been arrested." (H. 8).

* The prefix "H" refers to the minutes of the Hearing held in connection with the Motion to Suppress.

1. The co-defendant, Manuel Medina.

Mrs. Cora then called over an unnamed male, whereupon the agents again identified themselves as federal agents and told him that the petitioner had been arrested.

Additionally, Agent Mercado stated 'I also instructed him, I said, "Please don't let anybody know he has been arrested." (H. 9).

The agents and the petitioner then drove away thereupon Miranda admonitions were given. Cora told the agents that he was working, had a good job that he didn't want to lose, but that he did not have money for a lawyer. Agent Mercado replied, "Don't worry about it. If you can't afford a lawyer, we[2] will provide you with a lawyer." (H. 11).

When they arrived at the Drug Enforcement Administration office in Manhattan, Agent Mercado was notified that Mrs. Cora had already telephoned and left a message for him. He returned the call at about 2:00 P.M., and told Mrs. Cora that the petitioner "would be at the Magistrate's office, he was going down to the Southern District." (H. 10). Agent Mercado testified that Mrs. Cora stated:

> " 'Where is he going, where are you taking him?'
>
> And I told her the exact location, 'We're bringing him down to the Southern District.'
>
> She says, 'How much money do we need, do we need a lawyer?'
>
> And I said, 'A lawyer will be appointed,' because he said he couldn't afford a lawyer. He will probably be home later on that evening." (H. 12)

---

2. The administration of criminal justice under the Fifth Amendment to the United States Constitution could not function if such were to occur.

Agent Arthur Scalzo, also of the Drug Enforcement Administration, testified that he arrested the petitioner who repeatedly stated in a frenzied manner, "I want to talk to my daughter, I want to talk to my wife" (H. 16).

The petitioner was then placed in a government vehicle whereupon Agent Mercado told him "to calm down, we will try to get you home tonight." (H. 17).

Concurrently Agents Mercado and Scalzo together with another Agent, i.e. Anthony Rodriguez, endeavored to placate Mrs. Cora and told her that, "If you calm down, we will try to get your husband home tonight." (H. 17-18).

Thereafter the petitioner allegedly stated that Agent Mercado had met him, wished to purchase multi-quantities of heroin, and was then taken to Manhattan to meet the co-defendant Medina (H. 22). The petitioner was then released to return home. He returned the following morning and only then was arraigned before a United States Magistrate who assigned counsel.

On cross-examination Agent Scalzo conceded that he had told a Hispanic male "Please don't let anyone know he has been arrested" (H. 25), and that at the time of the arrest he had told Mrs. Cora "We will try to help out your husband as best we can. Don't tell anyone on the block he was arrested." (H. 25).

It is submitted that instructing the petitioner's wife that she not tell anyone that the petitioner was arrested, and to a Hispanic male that he not tell anyone of the arrest constitutes an effective police interdiction of the right of one arrested to have anyone else at liberty obtain counsel on his behalf.

The petitioner testified that upon being arrested he told his wife to get a lawyer. Whereupon Agent Mercado interjected that he did not need one, that he just wanted to speak to him (H. 32). Additionally that Agent Mercado told Mrs. Cora that they just wanted to speak to the peti-

tioner, that he would be home in a few hours, that she was not to call a lawyer because the petitioner did not need one (H. 34).

The petitioner further related that when he was brought to the Drug Enforcement Administration offices, he was allowed to telephone his wife, and was told by Agent Mercado to "tell your wife not to worry about it, I don't need a lawyer" (H. 34). Additionally, the Agent told Mrs. Cora that "He will be all right, he will come home in a few hours" (H. 31).

Olga Cora, the petitioner's wife, testified that Agent Mercado told her not to make a scene. "He told me to be quiet, not to let anyone know what was going on, that as long as he cooperated with them, that he would be out this evening" (H. 52). She further related that she told the petitioner that she was "going to call a lawyer" and that Agent Mercado stated that "He doesn't need a lawyer right now. There is nothing wrong, he will be all right, trust me" (H. 53). Additionally, he was alleged to have told her that "everything will be all right if he cooperates with us. As long as he cooperates with us, everything will be all right" (H. 55).

Moreover, he was alleged to have told Mrs. Cora after the petitioner was released that if she wished she could call a lawyer.

The Trial Court thereupon rendered its opinion denying the motion by holding:

> "My only thought is this: In the circumstances under which this was done, having observed the witnesses, the admonition 'Don't call anyone, anybody,' is clearly the indication of anybody involving the others involved in the case. It is obvious that the prospects of flight and the avoidance of detection that it is quite clear here we don't have a person whose first brush with the law is this. In fact, he and his wife were both familiar with the legal pro-

cedures. He has had lawyers on previous occasions involving criminal offenses.

You have the two officers going here with an arrest warrant. Having had a warrant for his arrest issued and to infer they are going to say, 'we are going to take you in for questioning,' and not arrest him on the spot just stretches the imagination too much.

They are telling him in one phrase, and they have the cards all over the place, and I certainly credit the officers' testimony here that they read him his rights and tell him at one time, 'If you want a lawyer, one will be appointed for you,' and in another breath saying or indicating, 'Don't get a lawyer,' just doesn't wash with me and I accept their statements that they did tell him that he had a right to a lawyer.

The U.S. Attorney, he has it right there, told him to get a lawyer. The fact he was going to be released that night is probably an indication of what they expect to do with him down there. I can't believe that under these circumstances of their giving him his phone number and everything else, so if they wanted to get a lawyer they had even the number to call and say 'Stop immediately, don't question him any more. I represent him,' and the prior involvement there.

I believe under all the circumstances here my opportunity to observe the witnesses, that there is no violation of the defendant's rights here and the application to suppress the statements is therefore denied." (H. 61-62)

It is respectfully submitted that this opinion, and its affirmance by the Court of Appeals for the Second Circuit amounted to error of constitutional dimension.

STATEMENT OF FACTS AT TRIAL

The facts as applicable to the petitioner and as presented by the Government at trial in essence were as follows:

Agent Mercado testified that on March 12, 1980, he together with a confidential informant, were at Third Street between Avenues B and C in the Borough of Manhattan, New York City. Thereafter the petitioner motioned to them to follow him and they proceeded to Jefferson and Madison Streets, whereupon the petitioner entered Agent Mercado's vehicle. The petitioner was then alleged to have asked whether Agent Mercado wanted "an eighth" and upon being informed that he did, the petitioner responded that he had only an ounce, but that he would speak to his partner who he was sure had more, and departed. Thereafter Cora returned, together with Medina, his partner, discussions were had as to a prospective narcotic purchase, and Cora left, never thereafter to return.

The foregoing constituted the totality of the petitioner's alleged participation in the crimes charged.

POINT ONE

THE PETITIONER'S POST-ARREST STATEMENTS SHOULD HAVE BEEN SUPPRESSED

The Trial Court conceded that the admonition "Don't call anyone, anybody" was given by Agent Mercado. The Court, however, concluded that this was to be directed to others involved in the prosecution and was not meant to be construed as a prohibition against contacting an attorney.

It is respectfully submitted that this holding was constitutional error and the instruction when given to Mrs. Cora under all the circumstances constituted intrusive police activity. It was an effective deprivation of the petitioner's Sixth Amendment right to counsel. This was reinforced by the bizarre circumstances surrounding Mrs.

Cora's subsequent telephone conversation with Agent Mercado. This singular police impropriety was in no fashion vitiated by the subsequent reading of *Miranda* warnings. To the contrary, this court in Miranda[3] at 453 not only criticized deceptive police conduct, but specifically set forth in *Brown v. Illinois*, 422 U.S. 590 (1975) that *Miranda* warnings alone are insufficient to attenuate the taint stemming from an illegal arrest. It is far more egregious to be arrested and to have a family and/or friends directed or beguiled not to contact a lawyer. This not only thwarts the thrust of the Sixth Amendment right to counsel but also precludes any statement obtained being deemed voluntary.

Particularly inasmuch as the role of attorney is paramount prior to arraignment. *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964).

It is respectfully submitted that the holding of the Court of Appeals that the admonition not to tell anyone was directed only as to co-conspirators is without merit inasmuch as it was not given to anyone who was shown to know them. To the contrary it was given to the petitioner's wife and an unnamed individual as to each of whom there was not a single scintilla of evidence of wrongdoing and who did obey the police.

Such an order was both illegal and unreasonable and should not be sanctioned.

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3. *Miranda v. Arizona*, 384 U.S. 436 (1966).

CONCLUSION

A Writ of Certiorari should be granted so as to determine whether post-arrest police conduct requesting the petitioner's wife and friend not to contact an attorney institutes a violation of the petitioner's Sixth Amendment right to counsel.

Respectfully submitted,

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APPENDIX

EXHIBIT "A"—OPINION

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of April, One Thousand Nine Hundred and Eighty One.

PRESENT:
HON. WALTER R. MANSFIELD, Circuit Judge
HON. J. EDWARD LUMBARD, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALBERTO CORA, RALPH GRELLA, and ROBERT MILLER,

Defendants-Appellants.

Appeal from judgments of conviction entered in the United States District Court for the Southern District of New York.

Appellants were convicted of conspiracy to violate the federal narcotics laws (21 U.S.C. §835) and of distributing and possessing with intent to distribute heroin (21 U.S.C. §§2, 812, 841(a)(1), 841(b)(1)(A)). We affirm.

Appellant Cora contends that his post-arrest statements which indicated his willingness to cooperate with Drug Enforcement Administration officers should have been suppressed. At the time of Cora's arrest, DEA agents asked Mrs. Cora not to tell anyone that he was arrested. However, the agents also informed her that Mr. Cora was being arrested for violating the federal narcotics laws. Moreover, Cora was twice given complete *Miranda* warnings. Nevertheless, he argues on appeal that he was denied his right to counsel. The district court concluded that in the context of the arrest, the admonition not to tell anyone else was directed to others involved in the drug sales and was not to be construed as a prohibition against contacting an attorney. We hold that the district court's finding in this respect was not clearly erroneous. *United States v. Friedman,* 558 F.2d 1125, 1127 (2d Cir. 1977).

Appellant Grella argues for reversal because he was denied a fair trial on two separate grounds. First, he contends that the district court erred in excluding his post-arrest statement that he believed that he was engaged in a "rip-off" and not an actual narcotics transaction. Second, he argues that the prosecution's summation was improper because it alluded to evidence not present in the record and because it was inflammatory.

Grella's defense was predicated on his claim that he had never intended to sell any drugs but rather had intended to "rip off" prospective drug buyers. At trial, defense counsel had attempted to elicit from Grella his post-arrest statement to this effect. Counsel argued that the prosecution had suggested that the "rip-off" theory had been concocted during trial, and as an allegation of recent fabrication, he had a right to introduce the post-arrest statement

under Federal Rule of Evidence 801(d)(1)(B). In order to introduce a prior consistent statement under this rule, however, the proponent must show (1) that the prior statement is consistent with the in-court testimony, (2) that it is being offered to rebut an express or implied charge of recent fabrication or improper influence or motive, and (3) that the prior consistent statement was made prior to the time that the supposed motive to falsify arose. *United States v. Quinto,* 582 F.2d 224, 233-34 (2d Cir. 1978). Here, we do not see how the prosecutor's comments could fairly be construed as an allegation of recent fabrication. More importantly, there was no showing that the statement was made prior to the time when the motive to fabricate arose. The district court commited no error in excluding the statement. Moreover, we hold that there were no improprieties in the prosecution's summation.

Finally, with respect to appellant Miller, we find no error on the part of the district court.

Accordingly, the judgment of the district court is affirmed.

s/Walter R. Mansfield
Hon. Walter R. Mansfield

s/J. Edward Lumbard
Hon. J. Edward Lumbard

s/Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

EXHIBIT "B"—ORDER

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of May, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA

Plaintiff-Appellee,

-v-

MITCHELL ENGELSON, a/k/a "Buddy,"
ROBERT MILLER, a/k/a "Bobby",
RALPH GRELLA, a/k/a "Horse,"
MANUEL MEDINA, a/k/a "Blackie,"
ALBERTO CORA, a/k/a "Bucky,"

Defendants,

ROBERT MILLER, a/k/a "Bobby,"
RALPH GRELLA, a/k/a "Horse,"
ALBERTO CORA, a/k/a "Bucky"

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appelant, Ralph Grella.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/A. Daniel Fusaro
A. Daniel Fusaro, Clerk

by Francis X. Gundhart, Chief Deputy Clerk